No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

REPLY BRIEF OF APPELLANT.

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I.

Was the Denial of the Full Conscientious Objector Status by the Selective Service Appeal Board to Appellant Without Basis in Fact, Arbitrary and Capricious?

An examination of the Investigative résumé of the F.B.I. investigation of September 9, 1953, indicates that on November 25, 1952, appellant was convicted of drunk driving. This is the last date of any of appellant's alleged misconduct. His other so called acts of misconduct which are to indicate appellant's objective state of mind occurred before about March 27, 1951 the date of the first hearing of appellant by a hearing officer whose report was based upon the F.B.I. report which alleged even before that date of March 27, 1951, appellant had worked for a brewery, drank beer, was wild, got into a fist fight, and was

desirous of studying law. These alleged acts occurred before March 27, 1951 and September 18, 1948, and possibly before that time, while appellant was still a boy. See Statement of Facts—Opening Brief.

Appellant's last act of alleged misconduct on which we are to base his objective state of mind (according to appellee's contention) happened November 25, 1952 when he was convicted of drunk driving in Santa Monica, California. Only one conviction for drunkenness is recorded against appellant. See cases *William Chernekoff, Jr. v. United States of America,* 219 F. 2d 721 (9th Cir.), February 24, 1955, and *Rempel v. United States of America,* 220 F. 2d 949 (10th Cir.), 1955, which hold one conviction of drunkeness insufficient to show insincerity of appellant. The other old incidents held against appellant during his boyhood are minor, such as working for a brewery, being wild, being a smart aleck, a fist fight with another boy, using rough language and aspiring to be a lawyer, could not be sufficient to show an objective state of mind to find appellant guilty of a felony.

The Government is silent as to appellant's record of conduct between December 6, 1954 and September 28, 1955, the last time appellant was classified 1-A by the Appeal Board, a period of time about a year and nine months. There was a change in appellant's conduct between those dates to show his objective state of mind more fully. See pages 7 and 8 of Appellant's Opening Brief.

Also appellant produced evidence that he had repented and became a member of his religious congregation in good standing. See pages 17 and 18 of Appellant's Opening Brief.

II.

Was Appellant Illegally Denied His Right to an Investigation, a Hearing, a Report by a Hearing Officer and a Recommendation by the Department of Justice to the Board of Appeal Upon the Conscientious Objector Claim Contrary to Section 6 (j) of the Act and Section 1626.25 of the Regulations on His Third Appeal?

The Government leans heavily upon the cases of *Davidson v. United States,* 218 F. 2d 609 (9th Cir.) 1954, and *Clark v. United States,* 236 F. 2d 13 (C. A. 9, 1956), which hold where there is no additional evidence or no claim made of change of belief, appellant would not be entitled to a second hearing by the Department of Justice and investigation by the F.B.I. The new evidence presented by appellant to Local Board after his hearing of August 17, 1954 was a copy of his Congregation's identification card or certificate which shows he was now a member of the congregation in good standing, a very important and significant credential showing a change in appellant's conduct, that he is now a good, regular member of the congregation. This certificate was sent to Local Board No. 77, Covington, Kentucky, on May 11, 1955. In the *Davidson* and *Clark* cases, *supra,* there was no showing of any new evidence or change of circumstances. In the instant case we definitely show additional new evidence and change of circumstances. The appellant was entitled to a third investigation which was denied appellant from the time of his second appeal to his third appeal, a period of one year and nine months, which time would justify a third investigation, and enable appellant to show a sufficient change in circumstances. The Government argues that there was no basis in fact for the denial of the conscientious objector status based on his prior

misconduct. Since the prior misconduct may be considered by the Court as a basis of fact for the lack of sincerity, then it is absolutely essential that the Court hold that there must be another investigation based on the change of conduct and circumstances of appellant, a change of conduct and circumstances being that since the last investigation by Hearing Officer and F.B.I., appellant has married, settled down, has a child, works steadily, attends church regularly and has a certificate from his Congregation Head that he is in good standing as a Jehovah Witness. See pages 17 and 18 of Appellant's Opening Brief.

> "The case of *United States of America v. Donald Oscar Krueger,* 143 F. Sup. 65, Eastern District of Wisconsin, United States District Court, holds 'No decision that the Court has been able to find since the *Dickinson* case modifies the holding of the majority of the Court as therein set forth, namely, that there must be some basis in fact for the classification given the registrant. In the case of *Gonzales v. United States,* 348 U. S. 407, there were things in the record which cast some doubt as to the registrant's claim to being a conscientious objector and as to whether that claim was asserted in good faith or whether it had been asserted too recently and too closely relating to his draft status to warrant acceptance of his conscientious objector position as genuine. The Supreme Court reversed the Court of Appeals and held that under the overall procedures designed to be 'fair and just,' the registrant was entitled to receive a copy of the Justice Department's recommendation and be given reasonable opportunity to file a reply thereto. Nothing in that decision modifies the holding in the *Dickinson* case.
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> "The Court is of the opinion that, at least as of April 29, 1952, the record is such that the board could well believe there was some proof that is in-

compatible with the defendant's claim for conscientious objector status, and that this evidence and the record up to that date were such that it cannot be said that the refusal to grant conscientious objector classification at that time was based solely on suspicion and speculation.

"The question then arises whether anything that occurred after that time changed the situation.

"The registrant's letter of March 27, 1953 indicates that at that time he claims to be active in preaching from house to house and on the street. On May 1, 1953 registrant states, 'I am one of Jehovah's Witnesses.' There could have been a change in the situation between April 29, 1952 and May 1, 1953. When the matter was referred to the Appeal Board on May 7, 1953, the Appeal Board apparently did not refer the file to the Department of Justice for a second time. The law requires that on appeal from the refusal of conscientious objector status the Appeal Board shall refer the matter to the Department of Justice. Failure to do so under the decisions results in failure to grant the registrant the rights to which he is absolutely entitled. The Department of Justice, had it made an up-to-date investigation, might have found that the registrant's situation had changed. The Court believes that the registrant was entitled to such reference and to such advice. The file indicates that registrant claims that he was continuing his bible study and had become a member of Jehovah's Witnesses. For that reason the Court does not feel that the case of *Davidson v. United States,* 218 F. 2d 609, is controlling.

"Feeling that the defendant was denied a right to which he is entitled, namely, a second review by the Department of Justice, in view of the lapse of time and circumstances, and its advice and recommendation, it is the opinion of the Court that the defendant

has been denied this right and therefore, and for that reason, it is the verdict and judgment of the Court that the defendant is not guilty."

Also see case, *United States v. Donald Glen Thomas,* United States District Court, Eastern District of Wisconsin (March 19, 1956), 139 Fed. Supp. 427, page 4, which holds:

"The statutory requirement is clear and mandatory. The statute applicable reads in part:

" 'Any person claiming exemption from combatant training and service because of such (that is, as previously defined) conscientious objection *shall,* if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board *shall* refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, *shall* hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person *shall* be notified of the time and place of such hearing.' Title 50, App. Sec. 456 (j). (Emphasis supplied.)

"The Justice Department 'inquiry and hearing' actually amounts to an F.B.I. investigation and an interview by a hearing officer with the registrant. Among the things to be determined by the Department of Justice is 'character and good faith of the objections of the person concerned.' This provision specifically precludes the Justice Department from refusing jurisdiction of the registrant's claim on precisely the conclusion that the hearing is designed to establish. The Department of Justice in this whole proceeding occupies a position very much like a fact-finding body with no discretion to accept or to disallow claims submitted to it for investigation. The Justice Department makes no determination other

than to submit a recommendation to the appeal board. It is this board that determines a classification which the courts may not overturn if there is a basis in fact. *Gonzales v. United States,* 348 U. S. 407 (1955). The *Davidson* case which supported the United States Attorney's summary disposition of a referred claim without hearing is upon the ground that the claim presents no new facts that were not already investigated at a prior hearing.

"Under the present statute at the stage of the proceedings where the claim has been referred to the Justice Department, no exercise of discretion may be exercised by that Department to refuse jurisdiction where no hearing has yet been had on the claim, the registrant's own statement notwithstanding. It is only after the first claim has been denied that substantially similar claims may be rejected, and then it is the court's place to uphold the Department of Justice's action on the ground that the registrant is not prejudiced in being denied a hearing that he has had once and from which the Department's recommendation was made and was factually supported.

"The Selective Service Act and accompanying regulations are not without their complications for even judicial interpretation. To a very greater extent must the registrant find himself at a loss to understand his rights and the procedures available to him despite the presumption that he is aware of the law. Where the law is clear and mandatory in requiring a procedure for the benefit of the registrant, it must be followed.

"If Congress had intended that discretion should rest with the Department of Justice to refuse a hearing, it could have employed different language such as in cases 'where doubt exists' or 'in cases where a substantial factual controversy exists.' It could have used the word 'may' instead of 'shall.'

> "Congress may well have considered that these young men subject to the selective service law are usually not familiar with the law and the many regulations under it. It may well have made the hearing by the Department of Justice mandatory with the idea in mind that the registrant should have that additional opportunity to advance anything that he overlooked advancing previously in answer to his questionnaire. For all of which foregoing reasons the Court must reject the government's contention and find in favor of the defendant. It is the Court's finding that the defendant is not guilty of the crime charged in the Indictment."

Hull v. Stalter, 151 F. 2d 633, 7th Cir. (1945), at page 635. This case lays down the rule that a registrant should be classified according to his status at the time of current classification and not at the time of a prior classification.

Assuming that the Court will hold that the second reference of December 6, 1954, is adequate and sufficient. It may be that Sandner did not make his change from his past misconduct until after this date. Since the Court may hold that past activity inconsistent with the claim may be sufficient to defeat the exemption (*Roberson v. United States,* 208 F. 2d 166, 10th Cir. (1953), and inasmuch as the Department of Justice investigation is primarily for the benefit of the registrant there is an absolute necessity for a third reference to the Department of Justice.

There is not much doubt that new and additional evidence could be developed to show a more complete change of status if an investigation and hearing by hearing officer were had on the appellant's third hearing. There was a period of time over one year and three months to show

a change of circumstances. The whole theory of Christianity is that even a sinner can repent from his way. Once a lost sheep has repented he is restored to the fold and the rejoicing is greater in the congregation than when a new sheep is brought into the fold. For this reason the ruling in the *Roberson v. United States, supra,* is erroneous because of this doctrine of repentance.

If the Court in the case at bar concludes on any grounds that there was a basis in fact for the denial of the conscientious objector status, then because the lapse of time and the change in the course of conduct, there should be a third referral as was held in the Wisconsin cases of *Krueger* and *Thomas, supra.*

In the entire Registrant's file and his SSS 150 application form, appellant claims he is a Jehovah Witness and has preached from door to door. He informs the Appeal Board in a letter dated August 15, 1956, shown as Government's Exhibit "B" and included in their reply brief, that he is a Jehovah Witness and states that his moral code and philosophy conform with the teachings of Jehovah's Witnesses.

The letter of December 6, 1954 from the Justice Department shown as Exhibit "A" by Government that the Appellant did not base his claim on the teachings of any organization but upon his own moral code, philosophy and his own sociological views founded upon his interpretation of and conclusions from his study of the Bible. The entire record and file shows this to be a misstatement by the Justice Department's Hearing Officer.

The second hearing is absolutely defective because it is based on the erroneous conclusion that the registrant has a personal moral code and not religious training and belief for his conscientious objections. This conclusion

of the hearing officer, relied upon in the second recommendation of the Department of Justice, is of itself alone sufficient basis for a new Department of Justice hearing.

The court so held in *Blevins v. United States,* 217 F. 2d 506, 9th Cir. (1954), as follows:

> "This action of the appeal board was predicated in part upon that board's finding in concurrence with the local board that registrant's views were essentially philosophic and merely a personal moral code and not a religious belief. It is sufficient to say that there is no basis in the record for any such conclusion since both the local board and the appeal board based their classifications solely upon the written record and the statements and disclosures made by the registrant show beyond controversy that his claim of conscientious objection were based upon his Bible study and his belief in God. The appeal board also predicated this conclusion upon registrant's statement that he believed in self defense. This, again, furnishes no basis for a denial of conscientious objection as we have held in Hinkle v. United States, 216 F. 2d 8 (No. 14,163 decided September 24, 1954).
>
> "Furthermore, under the rule stated in the case of Sterrett v. United States, supra, and Triff v. United States (No. 13952, decided with Sterrett v. United States), registrant was refused the hearing by the Department of Justice which the statute required. Upon the authority of these two cases the judgment here cannot stand.
>
> "Reversed."

Dated June 7, 1957.

Respectfully submitted,

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Attorney for Defendant-Appellant.